IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1942.

No. 848

THE BROTHERHOOD OF RAILROAD TRAINMEN, ENTERPRISE LODGE NO. 27, et al.,
Petitioners,

vs.

TOLEDO, PEORIA & WESTERN RAILROAD,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY TO ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI.

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Cases Cited.

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REPLY TO STATEMENT.

The questions presented for the consideration of this Court (Pet. p. 5) do not require a review of the evidence of alleged violence. These questions relate to (1) extension of the restraining order beyond five days, (2) federal jurisdiction of the subject matter, (3) and (4) proof of compliance with two provisions of the Norris-La Guardia Act. Respondent has, however, insisted on making an extended statement as to purported proof of violence and, in

addition, attaching a diagram with "red dots" to show such alleged violence. Lest this statement create an impression of magnitude and extensiveness as to these acts, we wish to point out to the Court that with the exception of one exchange of blows between pickets and a strike-breaker following an automobile accident (R. 82) and an incident where a bottle of inflammable liquid was thrown upon an engine (R. 413), in which defendants insist no striking employee was involved, and several times when rocks were thrown at passing trains (R. 129), the proof of violence consisted practically entirely in testimony by railroad inspectors that at remote places in the company's line they found that glass had been broken in switch lights and that other minor damage had in some unexplained manner occurred to railroad property.

I.

Respondent argues that when notice is given of the extension of the temporary restraining order, the five-day provision of Section 7 of the Norris-La Guardia Act has no application; that the act only applies to extensions made without notice. This argument violates the plain language of the act, which says nothing whatsoever about "extensions" being granted on notice or any other basis. The act specifically says that the original temporary restraining order itself "shall become void at the expiration of said five days." There is no provision made for any extension and a court cannot read into a statute an exception which the Congress did not see fit to include.

II.

In our petition and brief we pointed out that under the decisions of this Court the rule has been established that before a case arises under a law of the United States, the basic substantive right which a plaintiff claims has been violated or is about to be violated, giving rise to his cause

of action, must have its origin or creation in an Act of Congress. Many cases of this Court have expressed this principle in language to the effect that the Act of Congress relied upon must be so fundamentally the basis of the lawsuit that its construction in one manner will allow recovery and in another way will defeat recovery.

Respondent in its brief seeks to bring its cause of action within this language by saying that this case necessarily involves the construction of its rights and duties under the Interstate Commerce Act, the Railway Labor Act, and the Norris-La Guardia Act. But this misses the point. This railroad is seeking to enforce its fundamental substantive right to be free in its business from acts of violence. This respondent admits, but claims it is a federal right. At page 13 of the brief it states: "The right asserted by respondent to be free from violent interference of its business as an interstate carrier is created by the federal Constitution and statutes . . ." But, before this right becomes a federal one, it must have its origin in an Act of Congress. There must be in force a federal statute providing that plaintiff has such a right. The Circuit Court of Appeals recognized this necessity by reading the right into the Interstate Commerce Act and holding that because a railroad had certain duties with reference to providing transportation, it had ipso facto the implied federal right to be free from acts of violence hampering it in the performance of those duties. As we have pointed out, there is no basis in any language in the act or in any view of the Congressional intent, to read this federal right into the act.

Nor does the Railway Labor Act create any such right. It says nothing whatsoever about this matter. We are here dealing with the question of the fundamental jurisdiction of the District Court over the subject matter. If this requirement would be satisfied, then the question would arise as to compliance with the special jurisdictional

statute, i. e., Norris-La Guardia Act. Then, and only then, would the Railway Labor Act be involved, and then only to determine if the obligations imposed by it had been complied with as required by the Norris-La Guardia Act and whether it relieved plaintiff of the necessity of arbitrating a dispute in order to comply with the Norris-La Guardia Act. The mere construction of a procedural or jurisdictional statute does not make a federal question. What must be involved is the construction of a statute creating a substantive right. This substantive right must be so fundamentally the basis of plaintiff's right to recovery that its construction one way will defeat the case and, in another way will allow recovery. It could just as logically be argued by respondent that this present jurisdictional point involves the construction of Section 24 of the Judicial Code, and, since a construction of this act in one manner will defeat him and in another will not, a federal question is involved. Similarly, it could be argued that when any other procedural or jurisdictional statute was seriously involved in a case, a federal question was involved. But this is clearly contrary to the principle that a case "arises under the laws of the United States" only when the right sought to be asserted as the substantive basis of the merits of the case, was created by an Act of Congress.

Respondent argues that it was held in Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U. S. 548, 50 S. Ct. 427, and in Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515, 57 S. Ct. 592, that federal courts have jurisdiction to entertain suits by the employee to enjoin the employer and therefore the employer should have a right here. Those cases were brought to force the employer to recognize a union as the employee's bargaining agent, as the Railway Labor Act specifically required it to do. No question of jurisdiction was involved or discussed. They certainly do not stand for the proposition urged by respondent.

Respondent states in its brief (p. 28): "A careful analysis of the issues in instant case will demonstrate that the fundamental principle in this case and in the Lennon case is exactly the same." As we have pointed out, this case (Ex parte Lennon, 166 U. S. 548, 67 S. Ct. 658) was in its original form a suit by one railroad against other railroads to force the defendants to interchange freight. The Interstate Commerce Act specifically provided that the plaintiff had the express right to have freight interchanged, a thing which the defendants were refusing to do. This Court held that the case arose under a law of the United States, i. e., the statute which created the right of plaintiff to have its freight accepted. In the **Lennon** case the right asserted by plaintiff to have its freight interchanged was expressly created by the Interstate Commerce Act. But where is the federal statute that respondent says creates its right "to be free from violent interference with its business"? None has been pointed out, and none can be pointed out. The right exists by virtue of the common law of the State of Illinois, and not by federal statute. Consequently the case does not "arise under the laws of the United States."

The case of Southern Pacific Co. v. Peterson, 43 F. (2d) 198, quoted from on page 30 of the brief, was a suit to enjoin the Attorney-General of Arizona from enforcing the state train length limit law on the ground that it was unconstitutional. The question at issue here was not involved.

Respondent cites Sharp v. Barnhart, 117 F. (2d) 604, as being an answer to our argument that if the reasoning of the Circuit Court of Appeals is followed motor common carriers which have the same duties with reference to furnishing transportation as railroads will have the same implied federal right to be free from any act tending to obstruct or hamper them in such transportation, which right may be enforced in federal courts. In the case cited suit was brought to recover damages for the seizure of an interstate truck and its cargo. Certainly such act of

seizure was an interference with interstate commerce. Yet the Court stated at page 606:

> "We are convinced that the District Court correctly dismissed the suits for want of jurisdiction."

This, we submit; is in accord with our position here. The present case, too, should have been dismissed for want of jurisdiction.

III.

Respondent argues that because the evidence showed numerous acts of violence had occurred that this shows the public officers were unable or unwilling to protect their property. As we have pointed out the "fifty separate instances" of alleged violence are largely made up of the sort of testimony by employees of respondent that they had found cracked glass in switch lights, etc., with no proof of how the condition occurred, and there were actually only several occasions when real violence occurred. Nor is this argument warranted in its conclusion that because violence existed the public officials have been unable or unwilling to protect plaintiff's property. The only persons who were asked to give any protection were the Sheriffs of Peoria and Tazewell counties and the city police of East Peoria. It is true plaintiff notified a number of other sheriffs, city police and mayors on January 2nd. This was only the day before the injunction complaint was filed. Without doubt it was an attempt to create the evidence required by the act and was too soon before the restraining order to be any evidence of the failure of these officials to furnish protection.

As we have pointed out in our brief, protection was furnished by those officials asked and arrests were made in all instances when requested.

In our brief we pointed out that no complaint was made to the Governor and no request was made that the state

police or state militia furnish protection. This protection was available on the order of the Governor, but no request for it was made. Respondent attempts to reply by stating that the Governor is not a "public official," and cites Newton v. Laclede Steel Co., 80 Fed. (2d) 636, as so holding. That the Court did not even pass on this question is shown by its statement in the opinion at page 638:

> "No issue was made in the brief of lack of showing of the Governor's inability to protect Laclede's property."

The Governor, elected by the people, is certainly not a private official, but rather is a public official.

IV.

Respondent now argues that it has complied with Section 8 of the Norris-La Guardia Act, in that it has actually made every reasonable effort to settle the dispute. This is contrary to the position taken by them in the District Court, where they contended that they had the one alternative under this section of complying with the obligations imposed by law or the other alternative of making every reasonable effort to settle such dispute. The "Findings of Fact" made by the Court merely found that the railroad had complied with the obligation imposed on it by law [Par. (d)] (R. 970). At no place did the District Court ever find that it had made every reasonable effort to settle the dispute. In fact the District Court held otherwise in his oral opinion, stating at record, page 955:

> "Gentlemen, I think you men as lawyers know there isn't any way the Government of the United States could pass a law compelling arbitration in a case of this sort. I don't think that would be constitutional. It might be the proper thing to do to arbitrate this cause. As far as the Court is concerned and knows, it would be the proper thing to do, but I can't compel that sort of thing."

Thus the record shows that the District Court found that the proper and reasonable thing for the railroad to have done to settle the dispute would have been to arbitrate it. The Circuit Court of Appeals in its opinion makes a statement somewhat to the contrary. But this it had no authority to do, since such findings in a District Court are not subject to revision at the instance of an appellee who has not prosecuted a cross appeal (Morley Construction Co. v. Maryland C. Co., 300 U. S. 185, 81 L. ed. 593, 57 S. Ct. 325). And the District Court could not have held otherwise with the evidence in this record showing that the railroad deliberately provoked this strike shortly after war began, in order to make the employees accept their terms or take the consequences of an aroused public feeling against strikes.

The holdings of the cases cited by respondent and in the opinion of the Circuit Court of Appeals here to the effect that this section has no application where violence is involved are unsupported by any language of the act or by sound logic. In the present state of the law workmen and labor unions have the right in the furtherance of their labor cause to do nearly any act with the exception of violence. Consequently about the only time an employer could or would come into court for an injunction would be when violence had occurred. But if this section has no application when violence is involved, it means practically nothing. This was never intended by Congress.

Respectfully submitted,

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